

# Memorandum of Understanding between the Information Commissioner and British Board of Film Classification

## Introduction

1. This Memorandum of Understanding (MoU) establishes a framework for cooperation and information sharing between the Information Commissioner ("**the Commissioner**") and the British Board of Film Classification ("**the BBFC**"), collectively referred to as "**the parties**" throughout this document. In particular, it sets out the broad principles of collaboration and the legal framework governing the sharing of relevant information and intelligence between the parties. The shared aims of this MoU are to enable closer working between the parties, including the exchange of appropriate information, so as to assist them in discharging their regulatory functions.
2. This MoU is a statement of intent that does not give rise to legally binding obligations on the part of either the Commissioner or the BBFC. The parties have determined that they do not exchange sufficient quantities of personal data to warrant entering into a separate data sharing agreement, but this will be kept under review.

## The role and function of the Information Commissioner

3. The Commissioner is a corporation sole appointed by Her Majesty the Queen under the General Data Protection Regulation and the Data Protection Act 2018 to act as the UK's independent regulator to uphold information rights in the public interest, promote openness by public bodies and data privacy for individuals.
4. The Commissioner is empowered to take a range of regulatory action for breaches of the following legislation:
  - Data Protection Act 2018 (DPA);
  - General Data Protection Regulation (GDPR);

- Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR);
- Freedom of Information Act 2000 (FOIA);
- Environmental Information Regulations 2004 (EIR);
- Environmental Protection Public Sector Information Regulations 2009 (INSPIRE Regulations);
- Investigatory Powers Act 2016;
- Re-use of Public Sector Information Regulations 2015;
- Enterprise Act 2002;
- Security of Network and Information Systems Directive (NIS Directive); and
- Electronic Identification, Authentication and Trust Services Regulation (eIDAS).

5. Article 57 of the GDPR and Section 115(2)(a) of the DPA 2018 place a broad range of statutory duties on the Commissioner, including monitoring and enforcement of the GDPR, promotion of good practice and adherence to the data protection obligations by those who process personal data. These duties sit alongside those relating to the other enforcement regimes outlined in paragraph 4 above.

6. The Commissioner's regulatory and enforcement powers include:

- conducting assessments of compliance with the DPA, GDPR, PECR, eIDAS, the NIS Directive, FOIA and EIR;
- issuing information notices requiring individuals, controllers or processors to provide information in relation to an investigation;
- issuing enforcement notices, warnings, reprimands, practice recommendations and other orders requiring specific actions by an individual or organisation to resolve breaches (including potential breaches) of data protection legislation and other information rights obligations;
- administering fines by way of penalty notices in the circumstances set out in section 152 of the DPA;

- administering fixed penalties for failing to meet specific obligations (such as failing to pay the relevant fee to the Commissioner);
- issuing decision notices detailing the outcome of an investigation under FOIA or EIR;
- certifying contempt of court should an authority fail to comply with an information notice, decision notice or enforcement notice under FOIA or EIR; and
- prosecuting criminal offences before the Courts.

7. Regulation 31 of PECR, as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011, also provides the Commissioner with the power to serve enforcement notices and issue monetary penalty notices as above to organisations who breach PECR. This includes, but is not limited to, breaches in the form of unsolicited marketing which falls within the ambit of PECR, including automated telephone calls made without consent, live telephone calls which have not been screened against the Telephone Preference Service, and unsolicited electronic messages (Regulations 19, 21 and 22 of PECR respectively).

### **Functions and powers of the British Board of Film Classification**

8. The BBFC is an independent, not-for-profit company designated by the Secretary of State to be the age-verification Regulator under Part 3 of the Digital Economy Act 2017 (the Act) with responsibility for regulating the requirement in the Act that online pornographic material made available to persons in the UK on a commercial basis should not normally be accessible by persons under the age of 18.
9. The BBFC is responsible pursuant to the Act for assessing and determining whether the arrangements for making pornographic material available online comply with the requirements of section 14(1) of the Act.
10. The BBFC is also responsible pursuant to the Act for assessing and determining whether a person is making extreme pornographic material available on the internet to persons in the UK.
11. The BBFC is responsible for identifying and notifying non-compliant providers of online commercial pornography of any contravention of

the Act, and notifying ancillary service providers and payment service providers of the same. The BBFC may also direct internet service providers to block access to the material being made available in contravention of the Act by non-compliant providers of online commercial pornography.

12. Where the BBFC is satisfied that the requirements of section 14(1) of the Act have been breached, an enforcement notice may be served on the non-compliant person requiring them to end the contravention of section 14(1). A person on whom an enforcement notice has been served may appeal to the Independent Appeals Panel.

### **Purpose of information sharing**

13. The broad purpose of the MoU is to enable both the Commissioner and the BBFC to share relevant information which enhances their ability to exercise their respective functions.
14. This MoU should not be interpreted as imposing a requirement on either party to disclose information in circumstances where doing so would breach their statutory responsibilities. In particular, each party must ensure that any disclosure of personal data pursuant to these arrangements fully complies with both the GDPR and the DPA 2018. The MoU sets out the potential legal basis for information sharing, but it is for each party to determine for themselves that any proposed disclosure is compliant with the law.

### **Principles of cooperation and sharing**

15. Chapter 3.6 of the Secretary of State Guidance to the Regulator (the BBFC) states:

*The role of the Regulator should be to focus on the ability of arrangements to verify whether someone is over 18. The Regulator should not duplicate the role of the Information Commissioner's Office (ICO), the UK's independent body set up to uphold information rights.*

16. The requirement for age-verification services and online pornography providers to comply with data protection legislation and information about the ICO's regulatory role are set out in

Chapter 4 of the Guidance on Age-verification Arrangements published by the BBFC.

17. As set out in Chapter 3 of the Guidance on Age-verification Arrangements, subject to any legal restrictions on the disclosure of information (whether imposed by statute or otherwise) and at its discretion, the BBFC agrees that it should inform the Commissioner where concerns arise during its assessment of the Age-verification effectiveness that the arrangement does not comply with data protection legislation. The BBFC will inform any online commercial pornography provider that it has raised concerns with the Commissioner. The Commissioner may investigate any such concerns in line with her established investigative procedures.
18. As set out at 3.11 of the Guidance on Age-verification Arrangements, the BBFC is developing a voluntary, non-statutory certification scheme for age-verification solutions in consultation with the ICO. The BBFC agrees that it will inform the Commissioner of any non-certified age-verification solutions which it finds. Once the BBFC informs the Commissioner of a non-certified age-verification solution, the Commissioner will then assess whether further investigation is required and will take action accordingly. As set out in the Guidance on Age-verification Arrangements, the BBFC will assess age-verification arrangements in order to ensure that online commercial pornographic services using those arrangements meet the requirement under section 14(1) of the Act.
19. Subject to any legal restrictions on the disclosure of information (whether imposed by statute or otherwise) and at her discretion, the Commissioner agrees that she should inform the BBFC where concerns arise, during her regulation of the legislation set out in paragraph 4, to any potential breaches, or information relevant to the BBFC's duties set out above.
20. Subject to any legal restrictions on the disclosure of information (whether imposed by statute or otherwise) and at their discretion both parties will:
  - Communicate regularly to discuss matters of mutual interest (this may involve participating in multi-agency groups to address common issues and threats).

- Consult one another on any issues which might have significant implications for the other organisation.
- Notify one another of the outcome of a case before it is made public in those cases in which the other body has an interest.
- Share in confidence internal guidance and draft external guidance relevant to the functions of both bodies.

21. Both parties will comply with the general laws they are subject to, including, but not limited to, local data protection laws.

## **Legal basis for sharing information**

### *Information shared by the BBFC with the Commissioner*

22. The Commissioner's statutory function relates to the legislation set out at paragraph 4, and this MoU governs information shared by the BBFC to assist the Commissioner to meet those responsibilities. To the extent that any such shared information is to comprise personal data, as defined under the GDPR and DPA 2018, the BBFC is a Data Controller so must ensure that it has legal basis to share it and that doing so would otherwise be compliant with the data protection principles.

23. Section 131 of the Data Protection Act 2018 effectively creates a legal basis for the BBFC to share information with the Commissioner. Under this particular provision, the BBFC is not prohibited or restricted from disclosing information to the Commissioner by any other enactment or rule of law provided it is "*information necessary for the discharge of the Commissioner's functions*".

### *Information shared by the Commissioner with the BBFC*

24. The Commissioner, during the course of her activities, will receive personal data from a range of sources. She will process all such personal data in accordance with the principles of the GDPR, the DPA 2018 and all other applicable legislation. The Commissioner may identify that personal data she holds ought to be shared with the BBFC as it would assist them in performing their functions and responsibilities.

25. Under Section 132(1) of the DPA 2018, the Commissioner is permitted to share information with the BBFC where she has lawful authority to do so. In particular, it will be lawful in circumstances:
  - where the sharing is necessary for the purposes of the Commissioner discharging her functions,
  - where the sharing is for the purposes of criminal or civil proceedings, however arising, or
  - where the sharing is necessary in the public interest, taking into account the rights, freedoms and legitimate interests of any person ( as set out in section 132(2) of the DPA)
26. If information to be disclosed by the Commissioner was received by her in the course of discharging her functions as a designated enforcer under the Enterprise Act 2002, any disclosure shall be made in accordance with the restrictions set out in Part 9 of that Act.
27. Where information is to be disclosed by either party for law enforcement purposes under section 35(4) or s5(5) of the DPA 2018 then they will only do so in accordance with an appropriate policy document as outlined by section 42 of the DPA.
28. Where a request for information is received by either party under data protection laws or FOIA, the recipient of the request will seek the views of the other party as described in the FOIA section 45 Code of Practice, where the information being sought under the request includes information obtained from, or shared by, the other party. However the decision to disclose or withhold the information (and therefore any liability arising out of that decision) remains with the party in receipt of the request as Data Controller in respect of that data.

### **Method of exchange**

29. Appropriate security measures shall be agreed to protect information transfers in accordance with the sensitivity of the information and any classification that is applied by the sender.

## Duration and review of the MoU

30. The Commissioner and the BBFC will monitor the operation of this MoU and will review it initially after one year from the date of this document and subsequently from time to time as necessary.
31. Any minor changes to this memorandum identified between reviews may be agreed in writing between the parties.
32. Any issues arising in relation to this memorandum will be notified to the point of contact for each organisation.

## Key contacts

33. The parties have both identified a key person who is responsible for managing this MoU:
- 34.

<b>Information Commissioner's Office</b>	<b>British Board of Film Classification</b>
Adam Stevens - Head of Intelligence Email: <a href="mailto:ih@ico.org.uk">ih@ico.org.uk</a> Telephone: 0330 414 6785 Address: Wycliffe House, Water Lane, Wilmslow, SK9 5AF	Murray Perkins – Head of DEA Email: Telephone: Address: 3 Soho Square, London, W1D 3HD

35. Those individuals will maintain an open dialogue between each other in order to ensure that the MoU remains effective and fit for purpose. They will also seek to identify any difficulties in the working relationship, and proactively seek to minimise the same.

## Signatories

<b>Elizabeth Denham</b> <b>Information Commissioner</b>	<b>David Austin</b> <b>Chief Executive</b>
 Date: 8 October 2018	 Date: 8 October 2018